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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

FREDRICK PURVIS SMITH,

Defendant and Appellant.

F065713

(Super. Ct. No. CRM019729)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. Donald J. Proietti, Judge.

James F. Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and J. Robert Jibson, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

Appellant Fredrick Smith was convicted by jury of one count of possession of a firearm by a felon (former Pen. Code, § 12021, subd. (a)(1)).¹ He was acquitted of possession of ammunition by a prohibited person (former § 12316, subd. (b)(1)). In a bifurcated proceeding, the trial court found true the allegation that Smith had a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12, 668). He was sentenced to four years in state prison.

On appeal, Smith contends the trial court abused its discretion when it denied his motion for a continuance to obtain records necessary to support his motion to dismiss. He further claims the denial amounted to a violation of his constitutional rights to due process and effective assistance of counsel. We disagree and affirm.

FACTS

On June 18, 2011, at around 10:30 p.m., Police Officer Sean Cramer made a traffic stop of a four-door silver gray sedan. There were four occupants in the vehicle, so Officer Cramer called for backup. Officers Dayton Snyder, Christian Hambrecht, and several other officers, arrived within a minute. The situation was considered a “high-risk” traffic stop and the officers drew their weapons.

Officers Snyder and Hambrecht approached the vehicle on the driver’s side. Smith was seated in the rear passenger seat on that side of the vehicle. The driver was ordered out of the vehicle and indentified Smith as the occupant of the seat behind her. The other two occupants were seated in the right front and rear passenger seats.

When Smith was asked to exit, there was a shotgun between his legs. There was one live round in the chamber and two other rounds in the gun.

¹ All further statutory references are to the Penal Code unless otherwise stated.

PROCEDURAL BACKGROUND

The original complaint in this case, charging two counts and enhancements, was filed in June of 2011. Smith was arraigned on the complaint on June 22, 2011, and the preliminary examination was held on July 13, 2011. Arraignment on the information was held on July 27, 2011, and trial was set for September 6, 2011, and later reset for September 13, 2011. Smith did not waive his statutory right to a speedy trial so the deadline for trial was September 26, 2011.² The case trailed to September 22, 2011, for a courtroom to open.

On September 22, 2011, four days before the section 1382 deadline for commencement of trial, the case was dismissed. On September 30, 2011, the case was refiled, pursuant to section 1387.

Motion to Dismiss

On October 19, 2011, Smith filed a “Motion to Set Aside and to Dismiss” (boldface and some capitalization omitted) the complaint on grounds that the case had previously been dismissed with prejudice.

In opposition to this motion, the People alleged that the first case was dismissed because the prosecutor had another case that had to go to trial at the same time and that the dismissal was without prejudice.

On October 31, 2011, the trial court denied the motion to dismiss. The court rejected the defense argument that dismissal of the original case was “with prejudice” because somehow the prosecutor was going to attempt to introduce evidence (possession of a weapon) in another unrelated pending action to show intent pursuant to Evidence

² September 25, 2011 was a Sunday, so September 26 was deemed the 60th day. (We take judicial notice of this fact pursuant to Evid. Code, § 452, subd. (h).)

Code section 1101, subdivision (b). The trial court noted that any argument on Evidence Code section 1101, subdivision (b) had yet to be made.

Defense counsel asserted that the trial court, in ordering the original dismissal, never stated it was without prejudice. The court reiterated that there was no prejudice, i.e., unfairness or disadvantage to Smith, relating to the Evidence Code section 1101 issue.

On February 29, 2012, Smith was arraigned on the information in new case. On March 26, 2012, the matter was called for trial readiness and it was noted that April 29, 2012, was the 60th day from arraignment; a trial date of April 17, 2012, was set.

On April 17, 2012, the court noted that defense counsel had “ongoing medical issues” and reset the trial date to April 24, 2012, with a readiness conference the day before.

At the readiness conference on April 23, 2012, the trial date for the next day was confirmed. The trial court again noted that April 29, 2012, was the 60th day from arraignment and there had been no time waiver.

In Limine Motion to Dismiss

The following day, the date set for trial, Smith filed an “In Limine Motion to Dismiss,” (boldface, italics, and some capitalization omitted) which renewed the argument that the September 22, 2011, dismissal had been “with prejudice.” When asked by the trial court why counsel had delayed in filing the motion, defense counsel stated that it should have been filed two weeks earlier, but he was ill.

The trial court then heard arguments on the motion and tentatively denied it, noting that there was no evidence, “in any sort of documented form either by declaration, affidavit, court record, judicial notice, something of that nature,” that the dismissal was with prejudice as to the prosecutor’s ability to refile. Defense counsel argued that the motion was granted on the basis of a speedy trial violation, which he asserted meant it

was granted with prejudice. But the trial court noted that the minute order of September 22, 2011, which the court had the clerk pull, did not state the reason for the dismissal and that that date was actually four days before the statutory deadline for trial at that time. From this, the court inferred that the case had not “timed out,” that there was no speedy trial violation, and that the dismissal was because the prosecutor could not proceed with the trial due to a conflict. As such, the trial court reasoned that the dismissal would have been without prejudice to refile.

Request to Continue

Defense counsel indicated to the court that it wanted additional time to obtain evidence to show that the dismissal was with prejudice. The court responded that it would agree to such a continuance with an appropriate time waiver from defendant. Counsel responded that his “client should [not] have to be asked to waive time due to my illness. I think that the Court could make a good -- good-cause finding for a continuance, but I don’t think that there’s -- that I need that much time to do that.”

The trial court declined to find good cause to continue the trial, but did grant defense counsel the opportunity to obtain transcripts or declarations to support his motion within the time limit for trial. Counsel stated he would obtain the necessary court transcripts “by Thursday” of “this week.”³ On April 26, 2012, after defense counsel failed to produce any of the purported records, the trial court confirmed its tentative ruling denying the motion to dismiss and finding that the prosecutor was not barred from refiling the case pursuant to section 1387.

³ April 24, 2012, was a Tuesday; 60 days from arraignment was a Sunday, April 29, 2012, therefore the 60-day deadline for commencement of trial was Monday, April 30, 2011. (We take judicial notice of this fact pursuant to Evid. Code, § 452, subd. (h).)

DISCUSSION

Smith now claims the court abused its discretion in denying his oral motion for a continuance to obtain the necessary records to support his motion to dismiss the case by conditioning the granting of a continuance on Smith entering a general time waiver for trial. He further claims the denial amounted to a violation of due process and effective assistance of counsel.

The grant or denial of a motion to continue trial rests within the broad discretion of the trial court. (*People v. Strozier* (1993) 20 Cal.App.4th 55, 60.) Reversible abuse of discretion occurs only when the court acts arbitrarily, capriciously or outside the bounds of reason. (*People v. Froehlig* (1991) 1 Cal.App.4th 260, 265.) “In deciding whether the denial of a continuance was so arbitrary as to violate due process, the reviewing court looks to the circumstances of each case, “particularly in the reasons presented to the trial judge at the time the request [was] denied.” [Citations.]” (*People v. Courts* (1985) 37 Cal.3d 784, 791.) It is defendant’s burden to establish the existence of an abuse of discretion. (*People v. Strozier, supra*, at p. 60.)

We agree with respondent that, beyond the two days agreed to by defense counsel and granted by the trial court in order for counsel to obtain court records to support his motion to dismiss, Smith never requested a continuance for that purpose. His in limine motion to dismiss filed on the day set for trial was simply a reiteration of a motion to dismiss denied months earlier. It was not until the hearing on the motion on April 24, 2012, when the court stated that the record was insufficient to support Smith’s claim, that defense counsel agreed that a transcript of the hearing where the case was dismissed would be needed. After some discussion, in which the court stated that a continuance could be granted “with an appropriate time waiver,” defense counsel stated that he thought he could have the records “by Thursday,” which was two days hence.

When Thursday came, defense counsel did not present any records, but also did not request a further continuance. Even the supplemental points and authorities filed by defense counsel that day did not mention the need for more time or include a motion for a continuance. In the absence of a motion for a continuance, Smith has forfeited the claim that the court abused its discretion in denying it. (*People v. Riccardi* (2012) 54 Cal.4th 758, 810.)

In any event, continuances in criminal cases may only be granted on an *affirmative* showing of good cause. (§ 1050, subd. (e).) “Motions to continue the trial of a criminal case are disfavored and will be denied unless the moving party, under Penal Code section 1050, presents affirmative proof in open court that the ends of justice require a continuance.” (Cal. Rules of Court, rule 4.113.) While a trial court should not exercise its discretion to deny a continuance that would unfairly deprive a defendant of a reasonable opportunity to prepare a defense (*People v. Snow* (2003) 30 Cal.4th 43, 70), it is nonetheless not required to indulge every eve-of-trial defense request for additional time where diligence and good cause are not clearly demonstrated. (*People v. Courts*, *supra*, 37 Cal.3d at pp. 791-792.)

This was not a situation where circumstances beyond Smith’s control, such as the sudden illness of counsel or the filing of additional charges, made an eve-of-trial or mid-trial request for a continuance appropriate and compelling. (See, e.g., *People v. Brady* (1969) 275 Cal.App.2d 984, 993-994 [no abuse of discretion where reasonable opportunity to prepare or retain counsel of one’s choosing is provided].) Although defense counsel stated he was sick for a two-week period prior to trial, the motion counsel filed on the day set for trial was essentially the same motion made by the same counsel six months earlier in an effort to dismiss the complaint. Surely, counsel was or should have been on notice that a basis in the record would be needed to establish his claim.

Nor can Smith show actual prejudice. (See, e.g., *People v. Zapien* (1993) 4 Cal.4th 929, 972-973 [finding no prejudice from denial of a continuance where there was no reasonable basis to conclude from the defendant's showing that the trial court's ruling led to a less favorable result for the defendant].) There is no indication in the record that a transcript of the September 22, 2011, proceedings would have provided support for Smith's motion, i.e., that this case was dismissed with prejudice on the basis of a speedy trial violation. This is especially true in light of the fact that, according to the trial court, the clerk's minutes from the September 22, 2011, proceeding noted that the trial deadline was still four days hence.

We reject Smith's claim that the trial court abused its discretion in denying his request for a continuance.

We also reject Smith's claim that the denial of the continuance violated his right to due process and effective assistance of counsel because it interfered with counsel's ability to prepare his defense. No mechanical tests exist for deciding when a denial of a motion for a continuance is so arbitrary as to violate due process, so the answer lies "in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." (*Ungar v. Sarafite* (1964) 376 U.S. 575, 589.) Since "broad discretion must be granted trial courts on matters of continuances," nothing short of "an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay'" violates the right to counsel. (*Morris v. Slappy* (1983) 461 U.S. 1, 11-12.) Only a showing of an abuse of discretion and prejudice to the defense suffices to reverse a judgment on the basis of a denial of a motion for a continuance. (*People v. Samayoa* (1997) 15 Cal.4th 795, 840; *People v. Grant* (1988) 45 Cal.3d 829, 843.) As discussed above, Smith fails to make the requisite showing.

DISPOSITION

The judgment is affirmed.

Franson, J.

WE CONCUR:

Levy, Acting P.J.

Kane, J.